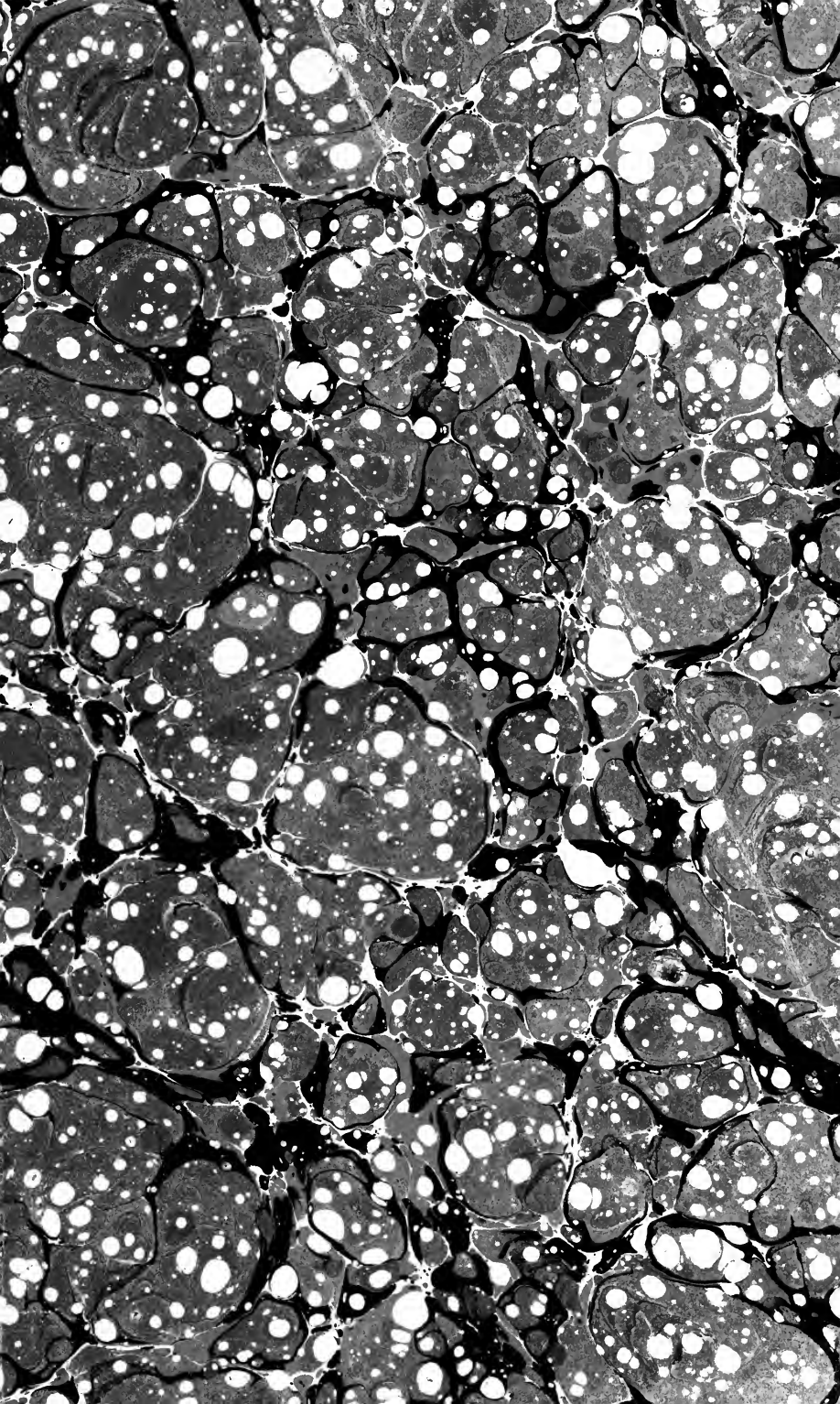

Compliments of

JOHN MARSHALL

An address delivered before the Graduates of the Chicago-Kent College of Law, at Chicago, June 2, 1900

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"Powerful and ingenious minds, taking as postulates that the powers expressly granted to the government of the Union are to be contracted, by construction, into the narrowest possible compass, and that the original powers of the States are retained if any possible construction will retain them, may, by a course of well-digested but refined and metaphysical reasoning, founded on these premises, explain away the constitution of our country, and leave it a magnificent structure, indeed, to look at, but totally unfit for use."—JOHN MARSHALL in *Gibbons v. Ogden,* 9 Wheaton, I.

JOHN MARSHALL.

I MAKE no apology for taking as the subject of my address before this graduating class the life and work of that great American jurist who, in the plastic period of American institutions, saved to his countrymen, through constitutional interpretation, the best fruits of the American revolution. For nearly thirty-five years, as head of the federal judiciary, John Marshall held the scales of justice with a firm and impartial hand. His judicial labors were marked by a courage so absolute; by an intelligence so original, so penetrating and so logical; by a sweep of argument so cogent and conclusive, and by a literary style so terse and luminous, that they stand apart from all others in American judicial history. When we add, that the constitutional problems which Marshall met and solved were wholly new; that they were controlled by no precedents; that they were insoluble by the application of mere legal erudition; that they entered into the heated and virulent political discussions of an unsettled era, and that upon their proper and courageous solution probably depended the continuance of the tottering union of the States, it will be seen that John Marshall is entitled to a

conspicuous place among the builders and defenders of the American nation.

The final biographer of John Marshall has not yet arisen. It is to be hoped the reviving interest in the man and his work consequent upon the approach of the centenary of his assumption of the office of chief justice may produce some utterance truly worthy of so great a theme. Whoever shall possess the genius to popularize Marshall's fame will do a work of infinite importance to American history. And here I speak of Marshall the chief justice, and of his work as such. Marshall the man is well enough known to those who care to read, and Marshall the judge is, indeed, a theme much discussed. Lawyers know of the causes he decided, and historians have hinted of the importance of his decision of them upon the course and development of American constitutional history, but no writer has traced out consecutively and fully the part which Marshall's great constitutional decisions played in assuring a permanent union of the States, and thereby securing free institutions to the American people.

Unfortunately, judicial labors are not of a character to attract popular applause. They seldom excite more than a temporary interest among the common people, and for this reason, so far as concerns popular appreciation, John Marshall yet remains the great unlaureled hero of early American history. We are all partakers of the bounty prepared by his genius and courage, and to-day I propose, if I can, to give to this graduating class some notion, inadequate though it be, of what

John Marshall was to his country and to American history, as distinguished from what he was simply to the particular litigants whose causes he heard and decided.

I am not unaware that hero-worshipers frequently attribute to their heroes a greater influence than they really exert. Men are born with certain capabilities, but however great a man may be, he acts, and can only act, within the iron walls of environment. A purely personal force may do much, but, after all, it finds its limitations in the facts and conditions about it. A masterful man acts upon, and in a greater or less degree modifies, his surroundings, and his surroundings in turn re-act upon him, and generally so deflect and modify his course as to make his final position and work a compromise. No man climbs completely over the fences of circumstance. Of course, a man of great power will find vastly wider play for his individuality than a weak man; but even the giants must take advantage of facts and turn aside for obstructions. When the mountains of opposition are too rugged to climb and too wide to tunnel, a wise man goes around them.

When Napoleon Bonaparte said, "I make circumstances," if he intended thereby to imply that he had nothing to thank for his wonderful career except his own genius, he uttered a bombastic untruth. He did, perhaps, in a sense, make many circumstances and pretty large ones, but the great historic facts and social conditions which made the career of Napoleon possible he did not make. No one man made them; no thousand men made them; no million men made them; and yet it must

be said that Napoleon took advantage of his opportunities and availed himself of the conditions of the society into which he was born in a way that only a master genius could have done. Were Napoleon now a living citizen of the United States, of the age at which he had arrived when he signed the treaty of Tilsit, his great executive ability might by this time have brought him to the head of some gigantic railway system; or his supreme gift of unscrupulous lying might ere now have made him a more successful manipulator of the stock market than was ever Jim Fisk or Jay Gould; or, had his early lot been cast in darker lines, his hard and cruel heart and utter contempt for the rights of his fellow-creatures might by this time have made him a more successful train robber and a more blood-thirsty bandit than was ever Bob Younger or Jesse James; but emperor of the United States he could never have made himself though he had combined the military genius of all the great captains of the earth. He, like all other men, would have worked within the limitations imposed by his age and time.

Since it is my purpose specially to consider John Marshall as a judge,—as the great fountain of constitutional interpretation,—I may fittingly dispose of the mere personal part of his history and of his minor services in a few preliminary words. He was born September 24, 1755, at Germantown,—a roadside village in Fauquier county, Virginia. His family were of sturdy Welsh extraction. In early youth he appears not to have been a hard student. As a boy he was fond of the sports of

the field. He dwelt with nature and loved and appreciated its beauties. A writer has described him at this period as "quiet and thoughtful in manner and full of a dreamy, poetic enthusiasm." He loved to wander alone in the trackless forests. He indulged the poetic longings natural to a great soul. He was a dreamer of dreams; and dreams, it has been said, sometimes outlast empires. The father of John Marshall was a man of sense and character, who read and appreciated the English classics and who early imparted to his great son his own love of English literature. It is not too much to say, this love of literature formed the best part of Marshall's early education. At fourteen the boy went for a year to an academy in Westmoreland county, Virginia. For another year he had a private tutor. At a later period he seems to have been enrolled as a student at the college of William and Mary, at Williamsburg, but the extent of his residence and studies in that institution is uncertain. It is, however, certain that his early acquaintance with English literature, added to his mastery of the common English branches, and the two years or more of Latin which we know he received, constituted, in such a mind as Marshall's, a good working education.

At the age of eighteen he began the study of law, but the rising murmurs of the great American revolution were already in the air, and the appeals of patriotism were very likely to find a response in the heart of this enthusiastic youth, whose surroundings had been such as to cultivate to the highest point his appreciation of personal liberty and civil rights. At nineteen we find

him serving as a lieutenant in a company of the minutemen of his native Virginia, and as such he fought his first battle at Great Bridge, Virginia. Later, he was a captain in the army of Washington, and his military career, extending over more than four years, was sufficient to have obtained honorable mention of his name in American history had not his subsequent career on the bench so greatly overshadowed all else. He fought at the battles of Brandywine, Germantown and Monmouth. He was with Mad Anthony Wayne at Stony Point. He was with Lighthorse Harry Lee in the brilliant action at Paulus Hook. He suffered hardships with the patriot army in the winter encampment upon the impregnable heights of Morristown. He was with his great commander during the dreary midnight of the revolution, at Valley Forge. In all his military service he was steadfast, capable and valiant. He did his work in the army, as elsewhere, in a spirit of cheerful kindliness and modesty, which made every man who served with him, or who knew him as a soldier, his lifelong friend. He at length quit the army for lack of a command, the term of service of his men having expired. Tired of waiting to be assigned something to do, he finally resigned his commission and again took up the study of law, which during four years had been interrupted by arduous military service. His legal education was completed at the college of William and Mary.

Marshall was admitted to the bar in 1781 and immediately began practice in his native county of Fauquier. There was that in the man which inspired confidence,

and his success at the bar was almost instantaneous. Seeking a wider field, he, in a year or two, removed to Richmond, Virginia,—a city which continued to be his home until his death and in which his mortal remains now repose.

When John Marshall came to the bar there was not a single published volume of American reports. There was less law to be learned in Marshall's day than there is now, and a single mind could acquire and retain a far better mastery of its details than is possible with the bewildering mass which crowds the reports and text-books of the present time. These great additions to the law are the outgrowth of the immense and healthful development which has taken place in American business in the last hundred years. The principles of the common law have not been much changed, but they have been extended to meet thousands of new situations and conditions not contemplated or foreseen when Marshall came to the bar, for it is the glory of the common law that it denies no man justice because his case is new, and excuses no man from the performance of duty because statutes have not defined the remedy. But this immense superstructure of the law is built entirely upon the old foundations. It was all embryonic in the old law, and its rapid and myriad development, as this class have probably learned, has imposed a prodigious labor upon the man who, at this day, would master the details of the common law.

It is not recorded that John Marshall ever desired or sought public office, yet his personal popularity and the

great confidence which he inspired in his fellow-citizens, regardless of party or opinion, caused him to be again and again elected to the Virginia legislature,—a post he always accepted solely from a sense of public duty, which was ever uppermost in his mind. He had married at the age of twenty-seven, and already a growing family demanded his best professional efforts. He was of counsel in all important cases, and could earn by his law practice at Richmond about $5,000 per year,—as good in that time, I dare say, as $20,000 would be to-day to any lawyer in Chicago. He met as antagonists in his practice at the bar many great lawyers, whose reputations have survived, along with his own, for more than a century. Yet from this scene of labor, which he loved above any other in the world, he turned repeatedly to serve his State in the legislature, for he was a patriot by instinct and a statesman by divine right of character and brains. Nor was a service in the legislature then what such a service is to-day. Questions of national importance and of the highest statesmanship were continually arising for discussion, and, in Virginia at least, the ablest men were sent to discuss them. Marshall met in the legislature of Virginia many men who have left great national reputations, and he met none of whom he was not the peer in wisdom and statesmanship.

A still more important service was rendered by Marshall in 1788, at the age of thirty-three, when he sat in the Virginia convention, called to consider and ratify or reject the Federal constitution. Marshall had always been a believer in law and order, and to that end had

favored the formation of a sovereign national government. Though not a member of the Federal convention of 1787, he was able and vigilant in defending its work and in urging the ratification of the constitution by the people of Virginia. In the Virginia convention he met in debate such men as George Mason, Patrick Henry, William Grayson and James Monroe,—all of whom were against ratification. One who reads Elliott's Debates on the Constitution and sees how utterly crude were the views of many of the delegates of the several States—how superstitious was their dread of governmental power, however well guarded—how the phantoms of George III and Lord North stalked constantly before their eyes—will realize how much progress has been made since that time in truly understanding the nature of the Federal government, and will also see how great was the need of a master legal mind at the head of the Federal judiciary in the early years of the republic. It was in this preliminary struggle that Marshall studied and mastered the constitution of the United States in all its wisely-distributed powers, in its complete adaptation to the needs of a confederated republic, in all its checks and limitations upon legislative and executive abuses, and in its further splendid tendency to protect individual liberty against all arbitrary power. Henceforth he was such an authority upon constitutional law as our country has not again seen and happily has not required. All Virginians in that day knew the country needed a more efficient central government, but a haunting, nameless fear was in every mind—a wholesome fear, let us admit, within

proper limits—that those who might hold the reins in the new government would abuse their power. In the debate Marshall grasped the heart of the question, as he always did, and said to those of little faith: "You cannot exercise the powers of government, personally, yourselves. You must trust to agents. If so, will you dispute giving them the power of acting for you, from an existing possibility that they may abuse it? As long as it is impossible for you to transact your business in person, if you repose no confidence in delegates because there is a possibility of their abusing it you can have no government, for the power of doing good is inseparable from that of doing evil."

Another great service rendered by Marshall to the young nation, before taking his seat upon the bench, was performed in connection with Charles Cotesworth Pinckney and Elbridge Gerry. The three went as commissioners to France in 1797, by appointment of John Adams. There was a state of virtual war between the two countries, and Washington, then lately retired from his second term, was at the head of a provisional army raised to resist French aggression. To Marshall fell the task of drafting the papers which the commissioners sent to the French Premier, Prince Talleyrand,—the most crafty, shameless and corrupt diplomat that perhaps ever lived. As the French Directory began by refusing to receive or treat with the commissioners officially until a bribe of £250,000 should be paid to them "on the side," the commission, of course, failed of its original purpose. But it accomplished the incidental purpose of maintain-

ing American dignity and honor, and of letting the corrupt French Directory know there were still some vertebrate men in the United States,—an article of which France had just then run lamentably short. At the publication of the story of French duplicity and corruption, and of the contumely which the American commissioners had suffered, the country took fire, and Marshall, to whom the maintenance of the country's dignity was popularly ascribed, became a popular hero, whom the people would have delighted to honor with any office in their gift.

About this time, at the earnest solicitation of Washington, Marshall accepted an election to Congress. He declined an appointment to the post of Attorney General, and also an offer of a place on the supreme bench as associate justice; but later he resigned his seat in Congress to accept the post of Secretary of State, the duties of which office he continued to discharge to the end of John Adams' term. In the meantime, however, a vacancy arose in the office of chief justice, and not the least of the great services to his country of that sturdy old patriot John Adams, was performed when, on January 31, 1801, he asked the Secretary of War to perform the duties of Secretary of State long enough to attach the seal of the United States to the commission of John Marshall as chief justice of the Supreme Court. The office had found the man, and happily the man was large enough to fill the office.

It was greatly to Marshall's advantage that he had learned how to try cases before he undertook the function

of deciding cases. This brought him into fellowship with the lawyers of his court, and gave him an appreciation of the labors of the bar which has been wanting in the case of some modern judges who have come to the bench, vealy and untried, and without such a preliminary seasoning as Marshall had in the contests of the bar. Marshall was always solicitous to hear arguments, and even demanded them, and he had the advantage in that day of listening to arguments from original thinkers like Webster, Pinckney, Dexter, Luther Martin, Edmund Randolph, Jared Ingersoll, Horace Binney, and many others.

Marshall first sat as chief justice on the first meeting of the court in the new capitol at Washington, February 4, 1801,—the hundredth anniversary of which day is soon to be appropriately celebrated by the bench and bar of the United States. To understand Marshall's distinctive work on that bench we must a little more fully consider the spirit of his time. The American revolution furnished several distinct phases of thought and opinion calling for distinct types of leadership. First, we have the stage of fiery agitation, wherein men like Sam Adams, James Otis and Patrick Henry are seen at the front. With this period Marshall, then but a boy, had little to do. Then came the actual conflict of arms, with the sane, conservative, steadfast and unconquerable George Washington leading his countrymen to independence and honor. Here we have seen Marshall taking an honorable though subordinate part. Then came the seven years' agony of our history, during which the central

authority was slowly perishing, and anarchy, hydra-headed, was rising upon its ruins. Those having the statesmanlike instinct were aghast and speechless at the prospect. The agitators were only noisy and helpless. Here, again, we have seen John Marshall, always by instinct constructive, combating the agitators, and out of the confusion of political tongues seeking to erect an orderly government. With the new government which at length rose from the confusion came another struggle, —greatest of all,—to define the relative powers, under the constitution, of the Federal government and the States—a struggle which lasted more than three quarters of a century, and only had its ending when, after a carnival of blood compared with which the revolution was as nothing, the victorious sword of Grant was sheathed at Appomattox.

High above the clamor of this stupendous controversy stands John Marshall, like another Moses upon another Sinai, expounding,—nay, making anew,—the constitution, for Mr. Bryce, in his American Commonwealth, has well said that the constitution is now "a far more complete and finished instrument than when it came fire-new from the hands of the convention. It is not merely their work, but the work of the judges, and, most of all, of one man—the great Chief Justice Marshall."

Marshall found between the lines of the constitution the "implied powers" without which the central government could not effectively have acted or the Union long have endured. The constitution was necessarily couched in general terms; Marshall supplied the details.

He made of us a nation by construction. His view was not only the view of a judge, but of a statesman, and in his day only a statesman was fit to act a leading part upon the supreme bench. Precedents were few in that day in any field of the law, and, so far as concerned the great questions of constitutional construction with which Marshall dealt, there were no precedents whatever. The government was new and comparatively untried. Its powers were organized and its functions assigned in a manner without any historic parallel. I am aware the members of the convention of 1787, as of the ratifying conventions, were pleased, after the somewhat pedantic custom of the time, to talk much of the "British model," the Amphictyonic Council and the Hanseatic League, but the new government was like no other in those essentials out of which the great work of Marshall arose. And let me say here that when I speak of Marshall as though he were the Supreme Court I so speak deliberately and advisedly. Upon questions of constitutional law, during a matter of fully thirty years, he dominated the court—not by bluster, not by violence, not by craft, but by the charm of a rare personality, by force of a native genius and wisdom and a power of cogent reasoning and common sense which are without parallel in judicial history.

One original feature of our government was its confederate form, and this confederation of many local governments, having local, domestic jurisdiction, under one great head endowed with national powers for national purposes, was precisely the feature which fitted our sys-

tem for the government of a vast territory like that of the United States. We now know that had local jealousies permitted the destruction, or even a very great restriction, of the powers of the States in a single, compact government, the strain of distant conflicting interests would probably have rent the central authority asunder, while it is certain if local views and interests had become completely dominant, as they came so near doing both in our early and later history, we should now be two or more nations instead of one. Our nationality was saved by trimming between extremes, but in the period of adjustment the blows of myriad conflicting opinions fell hard upon the national fabric, and nowhere harder than upon the Supreme Court. When a tribunal which carries no sword but reason, assumes, in the exercise of a violently contested jurisdiction, to lay down the law to old and proud States and to departments of government confessedly co-ordinate with itself, violent protest, and even rebellion, is not unnatural.

Another distinctive feature of our then new government was its co-ordination into three independent departments,—legislative, executive, and judicial,—with a written constitution defining the jurisdiction and powers of each. This was not copied from England, for no such thing is found in her polity. In England the cabinet has long been only a committee of Parliament, and the queen is relegated to the high function of having birthdays. Englishmen talk finely of the British constitution, but their constitution is a delusion, because it is just what Parliament, at any time or on any occa-

sion, chooses to make it, for Parliament is politically omnipotent. England at the time of our revolution was a despotism with a Parliament at its head—rightly termed a despotism, because it was, in that day, wholly unresponsive to the will of the English people. It was by the various extensions of the suffrage that the sway of Parliament has now become more endurable than that of a single absolute ruler. A fine speech was that of Lord Chatham when he said: "The poorest man may in his cottage bid defiance to all the forces of the crown. His hut may be frail, its roof may shake, the wind may blow through it, the storm may enter, the rain may enter, but the king of England cannot enter; all his forces dare not cross the threshold of the ruined tenement." All this was true, but the Parliament of England could enter the poor man's tenement. It entered the homes of America in the most insidious way,—through the taxing power,—without leave of the owners and against their will, and drove them to rebellion. A distinctive feature of the American constitution was, that, as construed and administered through the Federal judiciary, it extended the protection of personal rights not only as against the executive department of the government, but against the people's own representatives in the legislature.

But in a government of departments thus co-ordinated it was evident a tribunal must exist somewhere with jurisdiction to construe the fundamental law and define the powers of the several departments, as well as to mark the dividing line between State and Federal au-

thority. Without this there would have been a jargon of conflicting interpretations. The demonstrations of history were bloody and conclusive that the executive which held the sword could not be left to define its own powers. Again, if the legislative branch could finally have decided for itself what acts it might constitutionally pass, then that department would have had unlimited power by simply assuming to exercise it, and, thus armed, it would have usurped the whole authority and have become a law unto itself.

Now, the framers of the Federal constitution were exceeding wise men, and the wiser part of them did not express in that instrument in plain terms all they would have expressed had not the clamors of that time run so high and mad against "consolidation." The truly great statesmen of that convention compromised again and again in order to get any constitution at all, and they were confronted with the necessity of putting in nothing that might further alarm an already jealous people who were expected to ratify their work. It is not wonderful, therefore, that the constitution as it came from their hands nowhere said in plain words that the Supreme Court should be the final arbiter in all disputes of a Federal nature; that it should decide what powers were granted to the Union by the constitution, what powers were reserved to the States and what powers were expressly prohibited to the States; that it could define the limits of executive and legislative power under the Federal government, and should be the ultimate and sole judge of its own jurisdiction. All this the framers left

where John Marshall found it—"between the lines." With such an unvarnished statement as that in the constitution the people might have rejected it, and such men as Sam Adams, George Clinton, and even Thomas Jefferson would have been frightened out of their wits at the bare thought of giving the Federal Supreme Court so much power. It must be remembered that Mr. Jefferson, though eight years president, died at a green old age still denying any such jurisdiction or power in the Supreme Court, and he never forgave the pitiless logic by which John Marshall overwhelmingly established its existence.*

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* Proof of a total want of appreciation of the judicial labors of John Marshall is abundantly supplied in the writings of Mr. Jefferson. On May 25, 1810, he wrote President Madison, concerning a vacancy to be filled on the supreme bench: "The State has suffered long enough from the want of any counterpoint to the rancorous hatred Judge Marshall bears to the government of his country, and from the cunning and sophistry within which he is able to enshroud himself. It will be difficult to find a character of firmness enough to preserve his independence on the same bench with Marshall. * * * His twistification in the case of Marbury, in that of Burr, and the late Yazoo case, shows how dexterously he can reconcile law to his personal biases." Jefferson's candidate for the vacancy on the bench was John Tyler. On May 26, 1810, he wrote to Tyler: "We have long enough suffered under the base prostitution of law to party passions in one judge and the imbecility of another. In the hands of one the law is nothing more than an ambiguous text, to be explained by his sophistry into any meaning which may subserve his personal malice. Nor can any milk-and-water associate maintain his own independence," etc. When Cushing, one of Marshall's associates on the bench, died, Jefferson wrote in great glee to Albert Gallatin (September 27, 1810): "I observe old Cushing is dead. At length,

One of the framers of the constitution, Gouverneur Morris, at the conclusion of the great work, said that the success of the new government would depend entirely

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then, we have a chance of getting a republican majority in the supreme judiciary. * * * The event is a fortunate one, and so timed as to be a Godsend to me." A little later (October 15, 1810), he wrote Madison: "Another circumstance of congratulation is the death of Cushing." When this was written Mr. Jefferson was defendant in a suit for a very large sum, pending in one of the United States circuit courts, which he expected would be finally taken to the Supreme Court. He seems not to have been averse to helping along the "Godsend" by packing the court for the occasion. On December 25, 1820, —eleven years after Mr. Jefferson left the presidency,—he wrote Thomas Ritchie: "The judiciary of the United States is the subtle corps of sappers and miners constantly working underground to undermine the foundations of our confederated fabric. They are construing our constitution from a co-ordination of a general and special government to a general and supreme one alone. * * * An opinion is huddled up in conclave,—perhaps by a majority of one,—delivered as if unanimous, and with the silent acquiescence of lazy and timid associates, by a crafty chief judge, who sophisticates the law to his mind by the turn of his own reasoning." So long as Mr. Jefferson remained able to hold a pen he continued in his private letters to asperse the Supreme Court, and particularly Marshall. Part of this "sweltered venom" came to light soon after Jefferson's death in an edition of his writings edited by his grandson. When Marshall came to revise the life of Washington, in 1831, he paid attention, in a note at the end of the last volume, to one of the attacks of his distinguished enemy. This note is as conclusive as one of Marshall's opinions upon the constitution. It closes with these words: "This unpleasant subject is dismissed. If the grave be a sanctuary entitled to respect, many of the intelligent and estimable friends of Mr. Jefferson may perhaps regret that he neither respected it himself nor recollected that it is a sanctuary from which poisoned arrows ought never to be shot at the dead or the living."

on the way in which the constitution might be construed. This was a shrewd forecast, for, indeed, everything depended upon construction, and the contest, three-quarters of a century long, as to what the constitution meant, was already under way before George Washington was inaugurated. In the confusion many contradictory propositions were asserted. Among other things it was said Congress was the judge of the extent of its own legislative powers; it was said a State, through its legislature, could interpose to stop whatever it deemed a usurpation on the part of the general government; it was said the Supreme Court of a State was the final arbiter within its limits of all questions, State and Federal; and, finally, Gen. Jackson made a charge upon the question with all the energy and dash which overthrew Pakenham, and declared he proposed to enforce the constitution as he understood it himself! Marshall has himself stated in his life of Washington the state of opinion in the early years of the Republic. "The country," he says, "was divided into two great political parties, the one of which contemplated America as a nation, and labored incessantly to invest the Federal head with powers competent to the preservation of the Union; the other attached itself to the State governments, viewed all the powers of Congress with jealousy, and assented reluctantly to measures which would enable the head to act in any respect independently of the members." Among the men who thus "incessantly labored to invest the Federal head" with competent powers, Marshall himself was one of the greatest.

The controversy necessarily took on a political aspect. It was not in courts and among lawyers alone that the wrangling was done. The same local jealousies which denied the jurisdiction of the Supreme Court, as established in Marshall's decisions, had a little earlier denied, with menacing clamors, that the executive department under Washington had constitutional power to negotiate Jay's treaty of commerce with England or to issue a proclamation of neutrality in the war between England and France. All the great measures of Washington's administrations had been violently denounced by the same persons who, later, assailed Marshall's interpretations of the constitution. Indeed, it had been but a short time since, in the Virginia legislature, resolutions which Marshall himself had introduced as a member, expressing confidence in the "virtue, patriotism and wisdom" of Washington himself, came near being mutilated, after heated debate, on a motion to amend by striking out the word "wisdom." It seems past belief that the greatest Virginian that ever lived should have been accorded "wisdom" by a legislature of his native State by a slender majority of two or three. But such was the party spirit of that time, and I mention the fact here solely to show how bitter that spirit was.

The great constitutional questions of Marshall's day may be stated in general terms thus:

Is the Federal government the final judge of the extent of its own powers under the constitution?

Is the Supreme Court a subsidiary tribunal, which must take the law from congresses, presidents or from State

tribunals, or is it an independent tribunal, endowed with full power to finally construe the constitution and judge of its own jurisdiction?

Is the Federal government a sovereign nation, established by and acting upon the people, or is it a mere compact,—a treaty among sovereign States,—whereof no common and final judge is provided?

And subsidiary, in logic, to these, though yet greater in consequences, was that other momentous question: Is the Federal union perpetual, or may it be at any time dissolved by the action of one or more of its members?

It was certainly desirable that the Union should be found to be indissoluble at the same time that the States were preserved as indestructible. But if any of the theories of constitutional construction which were rife at the opening of the nineteenth century had prevailed except that maintained by Marshall, then national sovereignty would have become an empty name, and the people would have awakened to the fact that they had not formed, as they vainly declared in their constitution, "a more perfect union."

To the solution of these great questions, sounding in political considerations of the highest import, fraught with the deepest significance to all future generations of Americans, John Marshall brought all the resources of a great, original mind; he brought a legal learning so far removed from pedantry that it has even been disputed that he was learned at all; he brought a logical faculty so keen and searching that cavilers were silenced and answer was impossible; he brought a personal char-

acter as pure as the ermine he wore; and he brought the calm, clear vision of one of the first statesmen of the age. In solving them he lifted the Federal judiciary into a position of responsibility and independence, and made it what it was meant to be: the guardian of the constitution and the shield and defense of personal liberty for the American people.

It is not possible in a discourse like this to enter into details upon the great constitutional opinions delivered by Marshall, and yet a bare and bald statement of the points decided by him would now, after the mists of controversy have cleared away, seem commonplace, and would convey no adequate idea of the great work he performed. Much of his power is found in his style and manner. The ultimate propositions which his great decisions, as a whole, sustain may be thus stated: That the United States is not a mere compact but a sovereign nation; that within the scope of the powers delegated to it its government is supreme; that it was instituted directly by the people and acts directly upon and for the people; that States and State agencies are powerless to obstruct its operations, mar its integrity or terminate its existence; that its constitution, and the laws and treaties in pursuance thereof, are the supreme law of the land, and that in all cases of conflicting opinions as to the meaning of the constitution the Supreme Court has the right and power to ultimately and authoritatively construe it.

Whatever was incompatible with these fundamental principles in State laws or State decisions, or in the

action of officials, either national or State, met his swift and sure judicial condemnation, and it will surprise one who studies minutely the history of that time to see by how many different ingenious methods it was sought to impair the integrity of the Union. The sappers and miners were constantly at work beneath is foundations. Even ill-judging friends stabbed and wounded it in the darkness of ignorance. Marshall's was the great mind which had surveyed and fixed completely the boundaries of national power. He seems to have known, as no other man of that time knew, what remote redoubts and defenses must be held in order to maintain the citadel of national power, and he held them. He stood like an armed warrior, alert and invincible, upon the frontiers of the national domain, and in the forum of logic and law and sound reason he protected the Union against its enemies as absolutely as Lincoln and Grant afterwards defended it against the assaults of armed rebellion.

In Marbury v. Madison, 1 Cranch, 45, Marshall pronounced an act of Congress void as being in conflict with the constitution, and in doing so established the jurisdiction of the Supreme Court as the final interpreter of the constitution as against Congress.

In the case of The United States v. Judge Peters, 5 Cranch, 115, Marshall granted a peremptory mandamus to compel a United States district judge to enforce obedience to a judgment of his court. Judge Peters plead to the rule to show cause, an act of the Pennsylvania legislature protecting the defendants against Federal process, and said he "was unwilling to embroil the United

States with Pennsylvania." Marshall held the legislature of a State could not annul the judgments or determine the jurisdiction of the courts of the United States, and that the constitution and laws of the United States were the supreme law of the land.

In Fletcher v. Peck, 6 Cranch, 87, Marshall held a State statute void as being in conflict with the constitution, and this decision was followed in Marshall's time in twenty-six subsequent cases. Since his time the cases on the same point are innumerable.

In Martin v. Hunter's Lessee, 1 Wheaton, 304, he held the appellate power of the United States extends to cases pending in the State courts, and that the Federal statute authorizing such appellate jurisdiction was constitutional.

In the great case of Dartmouth College v. Woodward, 4 Wheaton, 588, Marshall applied the clause of the constitution prohibiting the passage of laws impairing the obligation of contracts. The doctrines of this noted case have been somewhat modified by subsequent judgments of the court, but the main doctrine announced is still followed.

In McCulloch v. State of Maryland, 4 Wheaton, 316, he held that Congress had power to charter the bank of the United States, and in the opinion he most lucidly and ably discusses the implied powers of the Federal government. He also held in this same case that the State of Maryland was prohibited from taxing a branch of the bank of the United States located in Maryland. This is a great opinion, which one who would understand the constitution must read.

In Cohens v. State of Virginia, 6 Wheaton, 264, he decided the Supreme Court could exercise jurisdiction in a case where a State is a party and a citizen of such State is the other party in a case arising under the constitution and laws of the United States, and for that purpose could revise a judgment of the highest court of a State.

In Gibbons v. Ogden, 9 Wheaton, 1, he asserted the great constitutional doctrine of the power of the general government to regulate commerce, and held that the word "commerce" in the constitution comprehends navigation. He here denied the right of the State of New York to grant exclusive privileges to individuals for the running of steamers between a port of New York and a port of New Jersey, and incidentally denied in a conclusive manner the claim that the powers of the Federal government should be "strictly" construed.

In Osborn v. Bank of United States, 9 Wheaton, 733, he held Congress might give the United States circuit courts original jurisdiction in any case to which the appellate jurisdiction extends, and also that a law of the State of Ohio laying a tax on the bank of the United States was void.

In Brown v. State of Maryland, 12 Wheaton, 419, he denied the power of a State to require an importer of goods to take out a license in the State in order to enable him to sell them, the fee required for such license being, in its substance and effect, a duty upon imports, and therefore prohibited to the States. The late "original package" decision is founded upon the doctrines

of this case. Marshall, however, suggested that after such imported goods have been mingled with the other property of the State they become subject to State taxation.

In Weston v. City of Charleston, 2 Peters, 449, he held that a State tax on the stocks of the government of the United States, being a tax on the power of the Federal government to borrow money on the credit of the United States, was repugnant to the constitution, and void.

In Craig v. State of Missouri, 4 Peters, 411, he held void a device of the State of Missouri designed for emitting "bills of credit" under the name of "certificates of stock." "Is the proposition to be maintained," asked Marshall, "that an act big with great and ruinous mischief, which is expressly forbidden by words most appropriate for its description, may be performed by the substitution of a name?"

Such are a few of Marshall's great judgments, but the heated agitation of the time, the violent opposition, and even open rebellion, which the work of the court aroused, cannot be put into cold and formal propositions or stated in a syllabus. For instance, in the case before mentioned of Martin v. Hunter's Lessee, a mandate had issued from the United States Supreme Court requiring the court of appeals of Virginia to carry the Federal court's judgment of reversal of a decision of the Virginia court, involving a Federal question, into effect. Virginia was Marshall's native state, where he was personally much beloved, but its highest tribunal took a rebel-

lious tone at being thus ordered to carry out a mandate of the United States Supreme Court. "The court is unanimously of opinion," gravely wrote the Virginia court, "that the appellate power of the Supreme Court of the United States does not extend to this court under a sound construction of the constitution of the United States; that so much of the 25th section of the act of Congress to establish judicial courts of the United States as extends the appellate jurisdiction of the Supreme Court to this court is not in pursuance of the constitution of the United States; that the writ of error in this cause was improvidently allowed under the authority of that act; that the proceedings thereon in the Supreme Court were coram non judice in relation to this court, and that obedience to its mandate be declined by the court." Martin then took a further writ of error to review this later defiant judgment, and the Supreme Court then reviewed the whole law of Federal jurisdiction in appeals from and writs of error to State courts. The opinion was handed down by Story, but no one who reads it, and who knows the terse and simple style and the cogent logic of John Marshall, will ever doubt that Marshall wrote every sentence of the opinion. Henry Adams says it was a great triumph of Marshall to thus induce Story, who had been appointed by Madison as a republican, to render this conclusive and far-reaching opinion confirmatory of Federal jurisdiction.

Again, in a certain case wherein a statute of Georgia was held void as conflicting with the constitution, that State openly rebelled and refused to carry out Marshall's

decision, and General Jackson, then President, said: "John Marshall has made his decision; now let him execute it."

Again, in Osborn v. Bank of the United States, which denied the power of Ohio to lay a tax upon the bank, which was an agency of the general government and chartered by it, that State in high dudgeon declared its adherence to the State rights resolutions of Virginia and Kentucky of 1798 and 1799, and the Senate of the State of Georgia joined Ohio in the cry, declaring the presence of the United States bank upon Georgia soil without the consent of the State was a usurpation of the sovereign power of the State, and bumptiously inquired what use were written constitutions, "if by latitude of construction they were made to embrace every power convenient for the party in control." They might have gone further and asked what use was a Federal constitution at all if each State of the Union, by its own narrow and final construction of that instrument, might virtually annihilate the government it established; but the Georgia Senate forgot this little consideration.

Kentucky's Governor, a little later, grew lugubrious, and declared in a message to the legislature that the sovereignty of Kentucky was so impaired by a decision of the Supreme Court that Kentuckians could "no longer be said to be a free people;" and yet the shooting and cutting still go on "upon the old Kentucky shore" as of yore, and the flavor of the Bourbon, when I last tasted it, was unimpaired.

Several States, including Virginia, joined in an ineffectual effort to secure a separate tribunal other than the Supreme Court, with jurisdiction to try all cases involving conflicts of State and Federal authority. It would have been interesting, had this effort succeeded, to note how the blade of Marshall's keen and merciless logic would have trimmed away the pretended jurisdiction of such a bastard court, provided it had been erected otherwise than by constitutional amendment. "Not a year went by," says Mr. McMaster, "but one or more States bade defiance to the Federal government;" and when we add that the popular clamors which accompanied all these formal declarations were loud and bitter, my statement that Marshall was a hero and that his work required high moral courage is fully justified. No man can win fadeless laurels by going with the tide. If a strong current had been running Mr. Leander's way, and he had been well provided with life preservers, he might have floated over the Hellespont every evening for a year, to gaze into the witching eyes of Hero, and yet never have been known to poetry or fame.

But somebody may ask, was Marshall always on the side of power and consolidation? Did he care more for a strong Federal power than he did for individual liberty? By no means. He meant his decisions should be (to borrow a late campaign phrase) as strong as the constitution, no stronger; as weak as the constitution, no weaker. He was as swift to vindicate the lawful authority of a State as he was that of the nation, and the

civil rights of the individual were always the subject of his zealous protection. In Bank of Hamilton v. Dudley's Lessees, 2 Peters, 492, he held that State courts have exclusive power to construe the constitutions and legislative acts of their respective States. "The judicial department of every government," he wrote, "is the rightful expositor of its laws, and, emphatically, of its supreme law." In Little v. Barreme, 2 Cranch, 170, he held the commander of a warship answerable in damages to a person injured, though he acted under instructions from the President, saying, "Instructions not warranted by law cannot legalize a trespass."

Soon after Marshall came to the bench he was called upon to preside in the Federal circuit court at Richmond in the famous trial of Aaron Burr for treason. Here, again, was illustrated his zeal in protecting personal rights. It was probably the most notable trial at nisi prius which, in the life of the nation, any Federal judge has been called upon to conduct. In the English law of treason, as it had been administered up to that time, the principal rule had been that enough heads must be cut off to glut the vengeance of the crown. The Federal administration was fiercely desirous of Burr's conviction and execution. The mob clamored for his blood. The prisoner was a profligate, insinuating and highly dangerous villain, who was then practically without friends, and whose hands were red and reeking with the blood of Marshall's own bosom friend, Alexander Hamilton, the late leader of the Federalist party. Burr had him-

self defined law to be "whatever is boldly asserted and plausibly maintained." Should Marshall try this friendless prisoner by his own rule and receive popular applause over his speedy execution, or should he, as was his wont, impartially enforce the law and submit to censure? It would have been easy, under such circumstances, to begin the administration of the Federal law of treason in the new world by establishing a precedent dangerous to personal liberty. But Marshall read in the constitution that "treason against the United States shall consist only in levying war against them or adhering to their enemies, giving them aid and comfort," and that no one should be convicted of the crime of treason except by proof of an "overt act," which act was to be established by the testimony of two witnesses. In what did "levying war" against the country consist? What should be deemed an "overt act?" Here were elastic terms, had the court sought a pretext for conviction. No such case as the constitution contemplated was, however, made out against Burr, and Marshall practically so instructed the jury, which acquitted the prisoner. "No man," said he, in summing up the case, "is desirous of becoming the peculiar subject of calumny. No man, might he let the cup pass from him without reproach, would drain it to the bottom. But if he has no choice in the case; if there is no alternative presented to him but a dereliction of duty or the opprobrium of those who are denominated the world, he merits the contempt as well as the indignation of his country who can hesitate which to embrace."

Men were not to be hounded to the gallows for treason, in the new world, upon mere suspicion. To "imagine the death of the King" or merely to plan the subversion of the government was never, through loose jugglery with the words of the constitution, to be punishable as treason upon American soil. There were to be no "Bloody Assizes" beneath the glorious banner of the free, and lese majeste was henceforth to be the protection only of despots and tyrants, who alone can require it. And who knows what influence this great precedent set by Marshall may not have had on that most splendid spectacle of all history, when, after a rebellion, the most gigantic of the ages, waged by men who sought to trample down by force the decisions of John Marshall, had been suppressed by arms, Justice closed forever her book of retribution and "stained not peace with a scar."

To know the full force and quality of Marshall's opinions one must read them. No others were ever delivered of such far-reaching consequences. The private interests involved in the cases were as nothing compared with the public interests which the opinions guarded. "The judgments of Marshall," wrote a contemporary, "carried the court through the experimental period and settled the question of its supremacy. Time has demonstrated their wisdom. * * * All the subsequent labors of that high tribunal on the subject of constitutional law have been founded on and have at least professed and attempted to follow them. There they remain. * * * They will stand as long as the constitution stands; and if that should perish they would

still remain to display to the world the principles upon which it rose and by the disregard of which it fell." Another wrote: "The fame of the chief justice has justified the wisdom of the constitution and reconciled the jealousy of freedom to the independence of the judiciary." A splendid statement, fit to be engraven upon Marshall's tomb! Story said of Marshall's work in the court: "His master mind has presided in their deliberations, and given to the results a cogency of reasoning, a depth of remark, a persuasiveness of argument, a clearness and elaboration of illustration and an elevation and comprehensiveness of conclusion to which none other offers a parallel."

Any staunch Federalist who was a good lawyer might perhaps have entered the same court orders upon the docket that were put there by Marshall; but who could have defended the conclusions of the court as Marshall did? His literary style was simple, compact and clear. His taste and aptness in illustration were faultless. He never sacrificed conclusiveness to brevity or sense to ornament; and yet, though he never strove for mere effects, his opinions, in their completeness, in their masterly anticipation of all cavils and objections, and in their overwhelming conclusiveness of argument, will appear to any one reading them with a due sense of the issues involved, as truly ornamental and as moving as the great speeches of Webster and Clay.

The judicial children of Marshall's brain went forth armored for defense, and so equipped and hedged about as to be invincible against assault. They "did their own

talking," and are still vocal with the power of nationality. Political agitators might carp at them, but to answer them was impossible. The questions discussed concerned the very foundations of the government. In viewing a subject Marshall always took his stand upon a great intellectual eminence, from which he could see the whole field of controversy. He seized at once upon that which was vital, and left mere incidents for subordinate treatment. He was always calm. He knew how to be impartial without being colorless. He could not be jostled from his intellectual moorings by clamor or swayed from his high judicial course by passion. He knew his interpretations of the constitution would be hotly contested and vehemently criticized, and so, about each one of his great judgments he set cherubim and a flaming sword, which turned every way to keep the way of the tree of national life.

Some one may ask, if the great questions of constitutional interpretation had at last to be fought out on the battlefield, of what use were the decisions of John Marshall? To this I answer, it made all the difference in the world which side was legally in the right in the great and final contest. Great is the power of ideas. "He is thrice armed who hath his quarrel just." It was infinitely important when the southern States seceded whether they were merely exercising a constitutional right accorded them by the court of final interpretation, or whether they were launching out upon the wild sea of revolution. When Abraham Lincoln announced his purpose to enforce Federal authority in the confederate

States and asked for men and means to carry out his purpose, it made all the difference in the world whether he was entering upon a war of preservation or a war of aggression and conquest; for, with a State rights construction of the constitution upon the records of the Federal court of last resort, nothing is surer than that the Union would have been dissolved, and it would probably have been dissolved without even an effort to save it.

And so, not without reason,—not as an empty figure of speech,—I place John Marshall among the builders and saviors of our Republic. He was near eighty years old and still a member of the court when he died, and it is infinitely sad to know that his later years were haunted by the fear that his great work had all been done in vain. The party which denied his interpretations of the constitution was everywhere in the ascendancy. The Union seemed to him to be tottering, and the great buttresses of reason and logic by which he had encompassed the national power seemed to be giving way before the assaults of determined enemies. On July 31, 1833, he wrote his friend, Judge Story: "I fear no demonstration can restore us to common sense. The words 'State rights,' as expounded by the resolutions of 1798, and the report of 1799, construed by our legislature, have a charm against which all reasoning is vain. Those resolutions and that report constitute the creed of every politician who hopes to rise in Virginia, and to question them, or even to adopt the construction given by their author, is deemed political sacrilege." A little later he again wrote Story: "To men who think as you and I

do, the present is gloomy enough and the future presents no cheering prospect. * * * In the south, those who support the executive do not support the government. * * * Many of them are the avowed advocates of the league, and those who do not go the whole length go a great part of the way. What can we hope for in such circumstances?"

But what must he have thought if he could have foreseen that in the year of grace 1860 an Attorney General of the United States would give to his chief a labored written opinion advising him that the Federal constitution gave to the national government no power to preserve itself as against any State that might choose to secede from it; that any attempt to coerce such State into submission to the national government would be making war upon a State without constitutional authority, and that such act of attempted coercion would be, in itself, a dissolution of the Union! And what must have been his anguish if he could have known that a President of the United States would deliberately put the substance of that opinion into a message to the Congress of the United States!

But, ah! had his vision penetrated a little further into the darkness of futurity, how it must have gladdened his great heart to have seen another man, modest and thoughtful like himself, coming out from the heart of the great people, "new birth of our new soil," with all the strength of a people's awakening in his knotted thews, with all their hopes and aspirations, all the will and fire of their patriotism radiant in his soul, laying his virile

hands upon the broken cords of the rent and shattered Union; to have seen this new-risen giant, as he groped in the thick darkness and confusion of 1861, stretching back a confiding hand to him for support and inspiration, and to have heard him repeat to a despairing nation those great, ringing words of his own opinion in McCulloch v. State of Maryland:

"The government of the Union is a government of the people; it emanates from them; its powers are granted by them and are to be exercised on them and for their benefit. The government of the Union, though limited in its powers, is supreme within its sphere of action, and its laws, when made in pursuance of the constitution, form the supreme law of the land."

Around John Marshall's old home in the capital of the Southern Confederacy raged four years of relentless war, —waged by his misguided countrymen to overthrow his great constitutional doctrines, and with them the union of the States. And when at length Jefferson Davis fled in confusion from his capital with the belongings of his government, and Abraham Lincoln, modest and unattended, entered the city of Richmond on that April morning in 1865, the day of Marshall's historic triumph and vindication had arrived; and how fitting it would have been if the friends of the old flag had then and there gathered to express their deep thankfulness for a restored Union about his humble and neglected tomb. Whoever may have received the surrender of confederate chieftains in the field, it is none the less true that, in accordance with the great historic unities, the Southern

Confederacy, as the embodiment of political ideas, surrendered not to Grant, not to Sherman, not to Thomas or to Sheridan, but to the statesman, the jurist and the sage,—John Marshall.

Ladies and gentlemen of the class, no time remains for mere preachment, and happily I have none to inflict upon you. You are upon the threshold of a profession which John Marshall long adorned and honored. I can do no better than to point you to that exalted career. I hold up before you his spotless purity of character, his unobtrusive manliness, his courageous devotion to duty, his unyielding faith in the right; and, with this before you, I say, in so far as you shall be like unto him in all these things you will deserve and receive the respect and esteem of your fellow-citizens.